

***UNITED STATES DISTRICT COURT***

**DISTRICT OF MAINE**

**MICHELLE ZAMPELLA,**

Plaintiff

v.

*JO ANNE B. BARNHART,*

*Commissioner of Social Security,*

*Defendant*

***Docket No. 03-232-P-C***

***RECOMMENDED DECISION ON MOTION TO DISMISS***

The defendant moves to dismiss this action pursuant to 42 U.S.C. § 405(g) as untimely filed. I recommend that the court grant the motion.

The complaint in this action seeks review of a decision of the defendant denying the plaintiff's application for Social Security benefits. Complaint (Docket No. 1). The statute at issue provides, in relevant part:

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

42 U.S.C. § 405(g). In this case, the notice of decision was mailed to the plaintiff on July 10, 2003.<sup>1</sup> Declaration of Robin M. Marquis, etc., attached to Memorandum in Support of the Commissioner's Motion to Dismiss ("Motion") (filed with Opposed Motion to Dismiss (Docket No. 9)). The plaintiff had until September 13, 2003 in which to file a court action. Motion at 1 n.2. The plaintiff does not dispute these dates. The court's docket reflects that the complaint was filed in this action on September 17, 2003. Docket.

The plaintiff asserts that "the complaint, summons and civil cover sheet were forwarded by [the] office [of her attorney, Vicki S. Roundy] to the Clerk of the US District Court in Portland Maine" on August 5, 2003. Plaintiff's Response to Motion to Dismiss (Docket No. 12) ¶ F. She argues that she "has no control over when the Court processed the documents." Memorandum in Support of Plaintiff's Objection to Defendant's Motion to Dismiss ("Opposition"), attached to Plaintiff's Response to Motion to Dismiss, at [2]. She has submitted evidence that she served the complaint on the Attorney General of the United States and the general counsel of the Social Security Administration at this time by way of receipts for delivery of certified mail, which are attached to her opposition, but no proof that the documents were received by this court at any date prior to September 17, 2003. Affidavit of Service (Docket No. 6) & copies of receipts attached to Opposition.

It is the practice of this court to date- and time- stamp every piece of mail that is received on the day it is received. The complaint in this action is date-stamped September 17, 2003, Complaint (Docket No. 1) and the docket reflects that summonses were issued to the plaintiff's counsel on that date, which have since been served and returns of service duly filed. Docket Nos. 6 & 8. The return of service was only

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<sup>1</sup> By regulation, the commissioner has interpreted the word "mailing" in section 405(g) as the date of receipt of the  
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filed after this case had been dismissed for failure to do so in a timely manner, following the failure of counsel for the plaintiff to respond to an order to show cause. Docket Nos. 3 & 4. The plaintiff's motion to set aside the dismissal was granted on April 9, 2004. Docket No. 7. No summons was received by the court with the plaintiff's complaint and cover sheet.

In federal court, a civil action is commenced by filing a complaint with the court. Fed. R. Civ. P. 3. A summons is issued by the court after the action is filed, and the summons must be served with the complaint. Fed. R. Civ. P. 4(b) & (c). Filing with the court is defined as "filing . . . with the clerk of court." Fed. R. Civ. P. 5(e). In this circuit, "[w]hen papers are mailed to the clerk's office, filing is complete only upon the clerk's receipt of them." *McIntosh v. Antonino*, 71 F.3d 29, 36 (1st Cir. 1995). The only filing of the complaint that took place in this case occurred on September 17, 2003.

The only case cited by the plaintiff in support of her position, *Wells v. Apfel*, 103 F.Supp.2d 893 (W.D.Va. 2000), is distinguishable. In that case, the clerk of court received the complaint along with an application for leave to proceed *in forma pauperis* on a date just within the 60-day statutory period, but the application was denied and the clerk did not mark the complaint as "filed" until the filing fee was received, some six weeks later. *Id.* at 894. The court held that the complaint was filed for purposes of the statutory limitations period on the date it was received, rather than the date on which the filing fee was received, despite a decision in the Seventh Circuit to the contrary. *Id.* at 896, 898. Here, by contrast, there is no evidence that the complaint was received by the court in a timely fashion.

A case much closer on its facts, indeed indistinguishable, is presented by *Manganiello v. Secretary of HHS*, 1983 WL 44218 (S.D.N.Y. Sept. 19, 1983). In that case, the plaintiff's attorney mailed a

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Appeals Council's decision and presumes that date to be five days after the date of the notice. 20 C.F.R. § 422.210(c).

summons, complaint, cover sheet and service form by express mail to the clerk of the relevant federal court; a customer receipt issued to the attorney promised “next day” delivery. *Id.* at \*1. However, according to the date stamp of the clerk’s office, the papers were not received until two weeks later, seven days after the 60-day period had expired. *Id.* Finding that there was no proof that the pleadings were delivered to the clerk before the 60-day period expired, the court granted the defendant’s motion to dismiss the action. *Id.* at \*2. *See also Trotter v. Chater*, 81 F.3d 164 (Table), 1996 WL 140983 (7th Cir. Mar. 26, 1996), at \*1. The same result is required here.

While this result might be considered harsh, delays of a single day have been held to require dismissal in similar cases. *See, e.g., Wiss v. Weinberger*, 415 F. Supp. 293, 294 (E.D. Pa. 1976); *White v. Secretary of Health, Educ. & Welfare*, 56 F.R.D. 497, 498 (N.D. N.Y. 1972). I note that counsel for the plaintiff has apparently made no request to the commissioner for relief from the 60-day limit as contemplated by section 405(g).

For the foregoing reasons, I recommend that the defendant’s motion to dismiss be **GRANTED**.

### **NOTICE**

***A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.***

Dated this 16th day of June, 2004.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

**Plaintiff**

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**MICHELE ZAMPELLA**

represented by **VICKI S. ROUNDY**  
LAW OFFICE OF VICKI S.  
ROUNDY  
42 LITTLEWORTH ROAD  
DOVER, NH 03820  
603-743-4800  
Email: vicki.roundy@prexar.com

V.

**Defendant**

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**SECRETARY OF HEALTH AND  
HUMAN SERVICES**

represented by **SUSAN B. DONAHUE**  
SOCIAL SECURITY  
ADMINISTRATION  
OFFICE OF GENERAL COUNSEL,  
REGION I  
625 J.F.K. FEDERAL BUILDING  
BOSTON, MA 02203  
617-565-4288  
Email: susan.donahue@ssa.gov